(R. 35-36). The corporation maintains no offices in Maryland, although it leases a small office in Alexandria, Virginia. No facilities are maintained by Smoot in Alexandria for the sale of sand or gravel. Any person desiring to purchase sand and gravel from Smoot is required to obtain these commodities from the corporation's plants and facilities in the District (R. 248). Title to all of the sand and gravel sold by the corporation in the District passes to the purchaser in the District. From 1948 through 1954, approximately 95 percent of the corporation's sales of sand and gravel were made in the District of Columbia (R. 36, 91, 250-252).

The corporation does not now and never has paid any income or franchise taxes to either the State of Maryland or the State of Virginia, and the District of Columbia is the only jurisdiction to which the corporation pays a tax of this nature. The only taxes of any kind which the corporation pays to Maryland and Virginia are personal property taxes and real estate taxes on real property owned by the corporation in those states (R. 254, 255).

Acting pursuant to regulations promulgated by the Commissioners of the District of Columbia under the District of Columbia Income and Franchise Tax Act of 1947, as amended, the Assessor of the District assessed and collected for the years 1948 to 1954 taxes on approximately 95 percent of the corporation's net income for each of the taxable years involved, based upon the percentage which the corporation's sales of sand and gravel in the District of Columbia bore to its sales of sand and gravel everywhere (R. 91-103). The assessments made against the corporation by the assessor were affirmed by the District of Columbia Tax Court and the decisions of the Tax Court were, in turn, affirmed by the United States Court of Appeals for the District of Columbia Circuit (R. 104).

On February 20, 1959, Smoot Sand & Gravel Corporation filed in this Court a petition for writ of certiorari. The petition for a writ of certiorari states:

> "The District of Columbia Tax Court was of the opinion that petitioner's position was sound. However, the Tax Court was also of the opinion that its hands were tied and that it was forced to decide wrongly against petitioner under *Lever Bros. Co.* v. *District of Columbia*, 92 U.S. App. D.C. 147, 204 F. 2d 39." (Petition, p. 5).

Nowhere in the opinion of the District of Columbia Tax Court does that court indicate, as stated by petitioner in its brief, "that it was forced to decide wrongly against petitioner under" the *Lever Bros.* case.

Petitioner, in an appendix to its petition in which it sets forth what it denotes as "Regulations Involved," has included a prefatory statement concerning certain testimony of District officials before a Joint Sub-committee of the Congress. Although this matter, if relevant, would appear to be more properly includible in a statement of the case, nevertheless, the testimony to which petitioner alludes was considered at length by the United States Court of Appeals for the District of Columbia Circuit in *Lever Bros. Co.* v. *District of Columbia*, 92 U.S. App. D.C. 147, 204 F. 2d 39, in which the court, referring to this testimony, noted:

> "* * * During hearings on the 1948 amendment, it is true, the District tax officials stated that it was their practice not to allocate to the District all the income from sales in the District, where the goods were manufactured outside the District 'Because part of that profit was earned by the manufacture, and only part of it by the sale.'[35] But this oral statement concerning allocation practice at that time was inaccurate. *All* the income from sales in which title passed within the District was then allocated to the District, regardless of 'manufacturing profit,' as a reading of the regulations

[35] Statement of Vernon E. West, Corporation Counsel for the District of Columbia, Hearings, *supra*, note 26, at p. 105.

would have shown. Further, the tenuousness of reading a representation of future practice into a statement of present practice seems obvious. Nothing in the record indicates that Congress was influenced by or relied on the quoted statement when it amended the Act."

SUMMARY OF ARGUMENT

Petitioner does not set forth adequate reason for the granting of the petition for writ of certiorari under the considerations governing review on certiorari as set forth by this Court in Rule 19 of its Rules. The decision of the United States Court of Appeals for the District of Columbia Circuit accords with prior decisions of that court which it has followed for a period of approximately 20 years and accords with decisions of this Court upon similar matters. No substantial question is presented by petitioner which calls for the exercise by this Court of its jurisdiction to review this case on writ of certionari.

ARGUMENT

I

This Court declines to review decisions of the courts of the District of Columbia in cases confined in their application to the administration of District of Columbia law. *American Security & Trust Co.* v. *District of Columbia*, 224 U.S. 491, 56 L. Ed. 856, 32 S. Ct. 553, *United Surety Co.* v. *American Fruit Product Co.*, 238 U.S. 140, 59 L. Ed. 1238, 35 S. Ct. 828. As was said in *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285, 80 L. Ed. 229, 56 S. Ct. 190:

> "In the view that the case does not fall within Rule 38, the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the

> District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District."

The statute involved in this case is the District of Columbia Income and Franchise Tax Act of 1947, as amended, a statute directed solely to the raising of revenues for the administration of the District of Columbia Government. This statute does not have application outside the District and, in the absence of extraordinary reason, which this case does not present, this Court will not review proceedings arising under it.

The considerations governing review on certiorari, as set forth in Rule 19 of the Rules of this Court, do not extend to the granting of the petition for certiorari in a case, where, as the record herein shows, the United States Court of Appeals for the District of Columbia Circuit has clearly rendered its judgment in accordance with applicable decisions of this Court.

II

The United States Court of Appeals for the District of Columbia Circuit, in a series of cases arising under the District of Columbia Revenue Act of 1937, the District of Columbia Revenue Act of 1939 and the District of Columbia Income and Franchise Tax Act of 1947, has repeatedly affirmed regulations, promulgated by the Commissioners of the District of Columbia under those acts, containing a sales factor for the purpose of apportioning income to be subjected to District tax in cases where the taxpayer is engaged in the business of selling personal property within and without the District. *Panitz* v. *District of Columbia*, 74 App. D.C. 284, 122 F. 2d 61; *Eastman Kodak Co.* v. *District of Columbia*, 76 U.S. App. D.C. 339, 131 F. 2d 347; *Bever Bros. Co.* v. *District of Colum-*

bia, 92 U.S. App. D.C. 147, 204 F. 2d 39; *District of Columbia* v. *Radio Corporation of America*, 98 U.S. App. D.C. 119, 232 F. 2d 376, cert. denied 77 S. Ct. 44, 352 U. S. 845, L.Ed. 2d 51. Each of these cases involved an attack either upon the validity of the Commissioners' regulations, or upon their application to the factual circumstances presented to the Court of Appeals by the complaining taxpayer. In the *Eastman Kodak Co.* case it was contended, as it was and is by Smoot in this case, that the sales formula prescribed by the Commissioners was invalid since it failed to take into account the fact that personal property sold by Eastman in the District of Columbia was produced elsewhere. That contention was rejected by the Court of Appeals.

Thus, currently, and for a period in excess of 20 years, the Commissioners, for the purpose of apportioning to the District income to be subjected to tax under District law, have, in one form or another, with the approval of the highest appellate court of the District, employed a sales factor under various revenue acts in force in the District. That this approach to taxation is a considered approach, conforming with decisions of the Supreme Court in similar matters, was noted by the Court of Appeals in its opinion herein (R. 91-103). That court observed that *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 41 S. Ct. 45, 65 L. Ed. 165; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U.S. 271, 45 S. Ct. 82, 69 L. Ed. 282, and *National Leather Co.* v. *Massachusetts*, 277 U.S. 413, 48 S. Ct. 534, 72 L. Ed. 935 each sustained use of a one factor formula under the proof adduced in those cases. In all of those cases, as the Court of Appeals observed, Constitutional attacks upon single factor formulas were rejected, and the apportionment of income on the basis of single factor formulas was upheld. The United States has itself employed the single factor of sales for

purposes of the administration of the Federal revenue statutes. *American Mfg. Co.* v. *City of St. Louis*, 250 U.S. 459, 39 S. Ct. 522, 63 L. Ed. 1084.

The contention of petitioner that the District's taxing measures reach income outside the District has been rejected by this Court in numerous similar cases. *New York* v. *Latrobe*, 279 U.S. 421, 49 S. Ct. 377, 73 L. Ed. 776; *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331, 60 S. Ct. 273, 84 L. Ed. 304, reh. den. 308 U.S. 640, 60 S. Ct. 385, 84 L. Ed. 331; *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267, reh. den. 312 U.S. 712, 61 S. Ct. 444, 85 L. Ed. 1143; *International Harvester Co.* v. *Evatt*, 329 U.S. 416, 67 S. Ct. 444, 91 L. Ed. 390, reh. den. 329 U.S. 834, 67 S. Ct. 628, 91 L. Ed. 706. The propriety of determining taxability on the basis of sales is amply demonstrated by both the majority opinion of this Court and the concurring opinion of Mr. Justice Rutledge in *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, 361, 64 S. Ct. 1019, 88 L. Ed. 1313. In his concurring opinion, Mr. Justice Rutledge observes that:

> "• • • If, therefore choice has to be made, whether as a matter of exclusive power to tax or as one of allowing credit, it should be in favor of the state of market or consumption as the one most certain to place the same tax load on both the interstate and competing local business."

See also *Department of Treasury of Indiana* v. *Wood Preserving Corporation*, 313 U.S. 62, 85 L. E. 1188, 61 S. Ct. 885; *Norton* v. *Department of Revenue of Illinois*, 340 U.S. 534, 71 S. Ct. 37, 95 L. Ed. 517.

CONCLUSION

Respondent respectfully submits that the judgment of the United States Court of Appeals for the District of

Columbia Circuit in this case was correct and that the petition for writ of certiorari should be denied.

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS PROMULGATED BY THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA

Constitutional Provisions Involved

The Fifth and Fourteenth Amendments to the Constitution of the United States of America, Vol. 1, U. S. Code. pp. XLIV and XLV.

"ARTICLE V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"ARTICLE XIV

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 328, ch. 258, as amended by the Act of May 3, 1948, 62 Stat. 206, ch. 246, and by Title IV, District of Columbia Revenue Act of 1949, 63 Stat. 112, ch. 146, and by Title XII, of the District of Columbia Public Works Act of 1954, 68 Stat. 101, ch. 218:

Section 4(h), Article I, Title I (Sec. 47-1551c(h), D. C. Code, 1951).

"SEC. 4. GENERAL DEFINITIONS. — For the purposes of this article and wherever appearing herein, unless otherwise required by the context—

* * * * *

"(h) The words 'trade or business' include the engaging in or carrying on of any trade, business, profession, vocation or calling or commercial activity in the District of Columbia; and include the performance of the functions of a public office.[1] *Provided, however,* That the words 'trade or business' shall not include, for the purpose of this article—

"(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; or

"(2) Sales of tangible personal property by a corporation or unincorporated business which does

[1] As originally enacted in 1947, Sec. 4(h) ended with the words "public office." The proviso to this section was added in its entirety by the Act of May 3, 1948, 62 Stat. 206, ch. 246.

not maintain an office or other place of business in the District and which has no office, agent, or representative in the District except for the sole purpose of doing business with the United States, but such corporations and unincorporated businesses shall be subject to the licensing provisions in title XIV of this article.

"For purposes of this proviso, the words 'agent' or 'representative' shall not include any independent broker engaged independently in regularly soliciting orders in the District for sellers and who holds himself out as such."

Section 1, Article I, Title III (Sec. 47-1557, D. C. Code, 1951.)

"SEC. 1. NET INCOME.—For the purposes of this article and wherever appearing herein, unless otherwise required by the context, the words 'net income' mean the gross income of a taxpayer less the deductions allowed by this article."

Section 2(a), Article I, Title III (Sec. 47-1557a(a) and Sec. 47-1557a(b)(13), D. C. Code, 1951).

"SEC. 2. GROSS INCOME AND EXCLUSIONS THEREFROM.—(a) The words 'gross income' include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this article, or income derived from any trade or business or sales or dealings in property whether real or personal, other than capital assets as defined in this article, growing out of the ownership, or sale of, or interest in, such property; also from rent,

royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains of profits, and income derived from any source whatever.

"(b) The words 'gross income' shall not include the following:

. . . . . .

"(13) Income derived from the sale of tangible personal property to the United States by corporations and unincorporated businesses having their principal places of business located outside the District, which property is delivered from places outside the District for use outside the District: *Provided, however*, that the taxpayer shall furnish to the Assessor a statement in writing of the amount of gross sales so made and, if required by the Assessor, a list of the names of the agencies of the United States through which such property was sold."[2]

Sections 1 and 2, Article I, Title VII (Sec. 47-1571 and 47-1571a, D. C. Code, 1951).

"SEC. 1. TAXABLE INCOME DEFINED.—For the purposes of this title, and unless otherwise required by the context, the words 'taxable income' mean the amount of net income derived from sources within the District within the meaning of title X of this article."

"SEC. 2. IMPOSITION AND RATE OF TAX. For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable

[2] As originally enacted in 1947, the Franchise Tax Act did not include paragraph (13). This paragraph was added by the Act of May 3, 1948, 62 Stat. 206, ch. 246.

income of every corporation, whether domestic or foreign (except those expressly exempt under title II of this article)."

Sections 1 and 2, Article I, Title X (Sec. 47-1580 and 47-1580a, D. C. Code, 1951).

"SEC. 1. PURPOSE OF ARTICLE.—It is the purpose of this article to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privelege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District: *Provided, however*, That, in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this article, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received as dividends from a corporation which is subtaxation under this article shall not be considered as income from sources within the District for the purposes of this article. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District;[3] *Provided, further*, That income derived from the sale of tangible personal property by a corporation or unincorporated business not carrying on or engaging in trade or business within the District as defined in title I of this article shall not be considered as income from sources within the District for purposes of this article, with the exception of income from sales to the United States not excluded from gross income as provided in title III, section 2(b)(13) of this article."

[3] As originally enacted in 1947, this section ended with the words "the District." The proviso following those words was added by the Act of May 3, 1948, 62 Stat. 206, ch. 246

"SEC. 2. ALLOCATION AND APPORTIONMENT.—The entire net income of any corporation or unincorporated business, derived from any trade or business carried on or engaged in wholly within the District shall, for the purposes of this article, be deemed to be from sources within the District, and shall, along with other income from sources within the District, be allocated to the District. If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without the District. Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this article."

REGULATIONS PROMULGATED BY THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA INVOLVED

The Commissioners of the District of Columbia, following enactment of the District of Columbia Income and Franchise Tax Act of 1947, and pursuant to authority contained in that Act, adopted regulations for the purpose of providing a basis for allocation to the District of Columbia for franchise tax purposes of the net income of a corporation deriving income from sources both within and without the District of Columbia.

On August 31, 1948, the Commissioners promulgated regulations reading as follows:

"SEC. 10-2. The measure of the franchise tax shall be that portion of the net income of a corporation or unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District, as defined in the Act, and such other net income as is derived from sources within the District. The portion of such net income which is 'fairly attributable' to any trade or business or such other net income as is derived from sources within the District shall be determined by allocation and apportionment thereof as prescribed in Sections 10-2(b), 10-2(c), 10-2(d), 10-2(e)."

* * * * * *

"SEC. 10-2(b). The word 'allocated' as hereinafter used in reference to income and deductions therefrom means a determination based upon actual figures specifically applicable thereto; and the word 'apportioned' so used means a ratable portion determined on a percentage basis. If the entire gross income is derived from engaging in a trade or business within the District or from sources within the District, all of such income shall be allocated to the District. If the gross income is derived from engaging in a trade or business partly within and partly without the District or from sources both within and without the District, such gross income shall be allocated and apportioned in accordance with the specific provisions or formulae prescribed in these regulations."

* * * * * *

"SEC. 10-2(d). *Income from Trade or Business.* If the trade or business is carried on entirely within the District, the entire gross income from trade or business shall be allocated to the District. If the trade or business is carried on partly within and partly without the District, that portion of the gross income from trade or business to be apportioned to the District shall be determined as follows:

"(1) *Income from sales of tangible personal property.*

"(a) Where gross income from any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business located in the District; and the phrase 'total sales' shall mean the gross receipts from all sales."

The foregoing regulations promulgated August 31, 1948, contained the following provision:

"SEC. 17. *Effective date of Amendments.* The amendments made by these regulations shall apply to the taxable year or part thereof beginning on the first day of January, 1948, and to succeeding taxable years."

On March 17, 1953, the Commissioners of the District of Columbia amended Section 10-2(d)(1)a of the regulations to provide as follows:

"SEC. 10-2(d)(1)a. Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which

were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business in the District; and the phrase 'total sales' shall mean the gross receipts from all sales."

On August 6, 1953, the Commissioners further amended the regulations applicable to income and franchise taxes. Section 10-2 of these regulations, as amended on August 6, 1953, provided as follows:

"SEC. 10-2. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District, as defined in the Act, and such other net income as is derived from sources within the District. The portion of such net income which is 'fairly attributable' to any trade or business or such other net income as is derived from sources within the District shall be determined by allocation and apportionment thereof as prescribed in Secs. 10-2(b), 10-2(d), 10-2(e)."

Section 10-2(b) of the regulations was amended to read as follows:

"SEC. 10-2(b). The word 'allocated' as hereinafter used in reference to income and deductions therefrom means a determination based upon actual figures specifically applicable thereto; and the word 'apportioned' as hereinafter used in reference to net income means a ratable portion determined on a percentage basis. If the entire net income is derived from engaging in a trade or business within the District or from sources within the District, all of such income shall be allocated to the District. If the net income is derived from engaging in a trade or business partly within and partly without the District or from sources both within or without the District, such income shall be allocated and appor-

tioned in accordance with the specific provisions or formulae prescribed in these regulations."

Section 10-2(d)(1)a of the regulations was amended to read as follows:

"SEC. 10-2(d). If the trade or business is carried on or engaged in wholly within the District, the entire net income from trade or business shall be allocated to the District. If the trade or business is carried on partly within and partly without the District, that portion of the net income from trade or business to be apportioned to the District shall be determined as follows:

"(1) Income from sales of tangible personal property.

"(a) Where income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. Every corporation and unincorporated business which carries on or engages in business in the District within the meaning of the words 'trade or business' as defined in the Act is, unless specifically exempted by some provision of the Act, subject to tax. For the purpose of this regulation, the phrase 'District sales' shall mean all sales to District customers the income from which is fairly attributable to the trade or business carried on or engaged in within the District, including solicitation in the District by salesmen or other representatives of the taxpayer, that portion of sales to customers outside the District the income from which is fairly attributable to the trade or business carried on in the District, and sales of tangible personal property the income from which is from District sources."

By Section 15 of the amendments of August 6, 1953, the effective date of those amendments was prescribed as follows:

"SECTION 15. *Effective Date of Amendments.* The amendments made by these regulations shall apply to the taxable year or part thereof beginning on the first day of January, 1948, and to succeeding taxable years."